

Chapter 6

Are Administrative Law Judges an Endangered Species?

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§ 6.01. Introduction.

This chapter considers whether the appointment of federal administrative law judges (ALJs) violates the Appointments Clause of the Constitution. It is necessary to discretely define the issue as such for two reasons: (1) First, the issue of ALJ appointments has drawn scholarly interest on a number of fronts,¹ and a focused approach on this single issue will best allow for it to

¹ See, e.g. Kent Barnett, “Resolving the ALJ Quandary,” 66 *Vand. L. Rev.* 797 (2013), where the author explores three issues related to ALJs: (1) whether their appointment violates

be fully explored; and (2) The Appointments Clause issue is the most timely as two recent circuit court opinions — one of which is being reconsidered at the time of this writing — could point to either a circuit split that will require Supreme Court resolution or potentially an overhaul of the administrative law judge system.² The resolution of this issue could result in a fundamental change in administrative litigation, which, correlatively, could impact the nature of dispute resolution between private parties and federal administrative agencies.

This chapter will review the legal underpinnings of the administrative law judge position and the Appointments Clause. It will next consider in detail the *Lucia* and *Bandimere* decisions, paying particular attention to the means by which the respective courts arrived at their decisions. Finally, it will consider how resolution of this issue could impact the administrative law judge position and administrative litigation going forward, including whether ALJs may indeed be endangered from a constitutional standpoint and how the Appointments Clause may provide a viable argument for practitioners in administrative litigation.

§ 6.02. The Administrative Law Judge.

The position of Administrative Law Judge is established by the Administrative Procedure Act (APA). The APA sets forth that required administrative hearings shall be conducted by (1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under Section 3105 of this title.³ Section 3105 of the APA authorizes agencies to appoint ALJs as follows:

the Appointments Clause of the Constitution; (2) the issue of presidential supervision over ALJs; and (3) whether ALJs exhibit sufficient impartiality.

² The two cases are *Lucia v. Sec. Exch. Comm'n*, 832 F.3d 277 (D.C. Cir. 2016) and *Bandimere v. Sec. Exch. Comm'n*, 844 F.3d 1168 (10th Cir. 2016). By order dated February 16, 2017, the D.C. Circuit granted petitioners' petition for rehearing *en banc*, vacated its decision and ordered additional briefing. Oral argument before the *en banc* court was held May 24, 2017. The resulting decision is pending.

³ 5 U.S.C. § 556(a)-(b); *accord Mullen v. Bowen*, 800 F. 2d 535, 540, n.2 (6th Cir. 1986) (noting that “[t]he ALJ’s position . . . is a direct creation of Congress under the [APA]”).